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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049

DEFENDANT JAMES ARTHUR RAY'S

(1) REPLY IN SUPPORT OF MOTION TO COMPEL DISCLOSURE OF ALL INFORMATION AND MATERIAL REGARDING THE MEDICAL EXAMINERS' OPINIONS ON CAUSE OF DEATH; AND

(2) REQUEST FOR SANCTIONS AGAINST THE STATE FOR ASSERTING WORK PRODUCT CLAIM AND INSTRUCTING WITNESSES IN BAD FAITH NOT TO ANSWER QUESTIONS.

REQUEST FOR EXPEDITED ORAL ARGUMENT

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Perplexed by the State's obstructive tactics, Dr. Fischione, the Chief Medical Examiner of Maricopa County, put it best: "this is probably, in 18 years on any criminal [case] that I've been involved in, the first time that a prosecutor has ever told me not to answer any question." Fischione Tr. 34:19–21, Exh. 62. In a striking display of bad faith, the State continues its unprecedented quest to conceal information regarding its meeting with the medical examiners on December 14, 2009. The record is clear that the medical examiners—*independent officials* who are *testifying expert witnesses* in this case—entered the meeting divided over the cause of death, and relied upon the information provided at the meeting in resolving their differences. Arizona law plainly entitles the defense to all information relied upon by these testifying experts. And *Brady* requires disclosure of information that, as here, undermines the State's causation theories. Unsurprisingly, the State's response identifies no legal basis for its stonewalling. None exists.

The State's attempt to invoke Arizona's limited work-product doctrine is ill-conceived. As an initial matter, the law is clear that the State waived any conceivable work-product claim by giving the materials to the experts for use in forming their opinions. Moreover, the requested materials are plainly not work product; they are not the theories, opinions, or conclusions of the County Attorney or her agents. To the extent the State insinuates that medical examiners are part of the prosecution team whom the State can silence at will, the Court should swiftly confirm the examiners' assertions of their professional independence.

Backpedaling from an unsupportable position, the State now changes the facts yet again. In spite of repeated statements that the December meeting was aimed at helping the medical examiners come to agreement as to cause of death, *e.g.*, Mosley Tr. at 11:2-8, 15-17 (Exh. 54), Lyon Tr. 22:8-13, 22:27-23:12 (Exh. 63), Diskin Tr. 26:7-11, 28:10-13 (Exh. 59), Poling Tr. at 23:15-23 (Exh. 60), the State now claims the meeting was a "charging decision meeting," and that the PowerPoint was not merely factual, Diskin Tr. 30:11-23, but instead set forth the investigators' analysis of the case. These new claims raise further troubling questions. Why would *law enforcement authorities* give the *medical examiners* a report at a charging meeting, as opposed to

the other way around? Why would a charging meeting occur two months before autopsy reports were even issued, and two months before the State reached a decision as to the charge? Arizona law and the federal Constitution do not require the defense to puzzle over these inconsistencies: The State must disclose the requested information and let the facts speak for themselves.

Accordingly, Mr. Ray respectfully requests an order compelling the State to disclose: (1) the names of all persons who attended the December 14, 2009 meeting; (2) a copy of the PowerPoint and all materials provided to the medical examiners; (3) notes, including prosecutors' notes to the extent they contain *only* statements of the medical examiners at the meeting; (4) re-interviews of Drs. Fischione and Lyon, Det. Diskin and Sgt. Boelts without further obstruction; and (5) any *Brady* material. Because the State has flouted discovery rules and knowingly withheld *Brady* material, Mr. Ray requests sanctions pursuant to Ariz. R. Crim. P. 15.7(5).

II. ARGUMENT AND AUTHORITIES

A. ARIZONA LAW AND THE FEDERAL CONSTITUTION ENTITLE THE DEFENSE TO DISCOVERY REGARDING THE DECEMBER MEETING.

The medical examiners are testifying expert witnesses. As such, Arizona law requires the State to disclose any "statements" they made at the meeting, whether written or oral. Ariz. R. Crim. P. 15.1(b)(4), 15.1(e)(3), 15.4(a)(1)(iii); *State v. Roque,* 213 Ariz. 193, 208-09 (2006). Furthermore, Arizona law requires "open discovery to probe the groundwork for [expert] opinions." *Emergency Care Dynamics, Ltd. v. Superior Court*, 188 Ariz. 32, 36 (1997). This rule is "designed to give the defendant an opportunity to check the validity of the conclusions of an expert witness and … have the evidence examined by his own independent expert witness." *Roque*, 213 Ariz. at 207. It would be "'fundamentally misleading, and could do great damage to the integrity of the truth finding process, if testimony that was being presented as the independent thinking of an 'expert' in fact was the product, in whole or significant part, of the suggestions of counsel." *Emergency Care*, 188 Ariz. at 35 (quoting *Intermedics v. Ventritex, Inc.*, 139 F.R.D. 384, 387 (N.D.Cal.1991)). Yet Mr. Ray cannot check the validity of the medical examiners' conclusions without knowing what facts the State did and did not provide to the medical examiners to "help them" reach their conclusions.

Moreover, the State's *Brady* obligation requires disclosure of material from the meeting. The State's contrary position is profoundly disingenuous. The information at issue here—a meeting designed to resolve the medical examiners' differences over the cause of death, in spite of their findings of *no* medical facts consistent with a clinical diagnosis of heat stroke—is plainly exculpatory. And the very fact of a State-coordinated presentation to overcome the lack of medical evidence supporting a diagnosis of heat stroke undermines the credibility of the State's case. *See Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) ("[T]he Brady duty extends to impeachment evidence as well as exculpatory evidence.").[1]

B. THE DECEMBER MEETING IS NOT "WORK PRODUCT."

The State cannot seriously argue that its December *meeting* is "work product" under Arizona law. In its desperation to manufacture this claim, the State's Response invokes a litany of inapposite points of law: the standard for discovery on allegations of racial profiling, the Federal Rules of Civil Procedure, and the standards for reversing a conviction, to name a few. Response at 7, 8, 14. These distractions cannot expand the clear bounds of Arizona's doctrine.

1. Any possible work product defense is waived.

As an initial matter, it is black-letter law that the State waived any conceivable work product defense by providing the materials to its expert witnesses. *See Green v. Nygaard*, 213 Ariz. 460, 463 (2006) ("[A] party waives the work product protection ordinarily afforded the work of a consulting expert when the party designates that expert to testify at trial."); 1 Arizona Practice § 501:6 (same). And Mr. Hughes' explicit instruction at the May 21, 2010 defense interview that the witnesses *could* discuss the meeting is an independent basis for waiver. Mosley Tr. 13:8-24.

2. The December meeting was not a "charging" meeting.

Seeking to shoehorn the December meeting into the work product doctrine, the State now asserts, for the first time, that the gathering of the medical examiners was the County Attorney's "charging decision meeting."[2] Response at 7. This strains credulity. No attorney spoke at the

[1] The State is correct that Mr. Ray has not filed a motion under Rule 15.1(g). There is no need for one. He does not seek "information not otherwise covered by Rule 15.1," but rather information squarely within that Rule's coverage.

[2] The County Attorney previously based its work product claim on a very different assertion: that

meeting. Diskin Tr. at 38:15-39:8. The medical examiners and Detective Diskin have all stated that the purpose of the meeting was to reach agreement as to cause of death. Motion to Compel 8–9. Moreover, the State has not explained why a charging decision would involve a presentation *by the police, to the medical examiners*, instead of the other way around. And the dates do not hold up. The meeting occurred in December 2009, yet as of late January 2010, the State said that it had reached no decision as to charges and sought to interview Mr. Ray. Even more puzzling, under the State's new account, the "charging decision meeting" occurred *two months* before the medical examiners issued their autopsy findings. Is it the State's position that the decision to charge Mr. Ray with homicides was made before a cause of death was identified?

3. The requested information is not "work product" under Arizona law.

Regardless of how the State now labels the meeting, there is no colorable argument that *any* of the categories of information Mr. Ray has requested fall within Arizona's limited work-product doctrine, which "protect[s] documents only to the extent that they constitute legal research or the 'theories, opinions and conclusions' of the parties and their agents," Comment to Ariz. R. Crim. P. 15.4(b), and only content that is "judgmental rather than factual," Commentary to ABA Standards for Crim. Justice 11-6.1 (cited in Comment to 15.4(b)). The State conveniently ignores Mr. Ray's specific requests, stating in conclusory fashion that Mr. Ray has requested the State's work product. Response at 1, 5, 14. Mr. Ray's actual requests show that the State is flatly wrong.

To begin, the State does not even attempt to argue that (1) the names of those who attended the meeting are a "document" or reflect attorney opinion, or that (5) constitutionally mandated *Brady* material can be withheld in the name of a State procedural rule.

Nor is there any tenable basis for withholding (2) the PowerPoint presentation. Detective Diskin stated that the presentation was factual, containing "pretty much entirely witness statements." Diskin Tr. at 30:11-23. As such, it cannot be work product, since its content is not judgmental but factual. If instead, the truth is (as the State now avers) that the PowerPoint conveyed the *State's analysis* of the alleged facts to its testifying experts, the urgency of

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all "[m]eetings between the prosecutors, investigators and medical examiners are work product protected by Rule 15.4(b)(1)." Do Decl. ¶ 15, Exh. 56.

disclosure is only heightened: Mr. Ray has the right to probe whether an expert opinion "in fact was the product . . . of the suggestions of counsel." *Emergency Care*, 188 Ariz. at 35.

Likewise, (3) notes from the meeting are not work product, so long as any attorney notes reflect "*only* the statements of medical examiners at the meeting." Motion to Compel at 4. The State's reference to a rule in "some states" that protects such notes from disclosure, Response at 10, is baffling. Arizona has no such rule. Instead, the law is that a prosecutor's notes of what a witness says are not work product, and it is error to not produce them. *See e.g.*, *State v. Reid,* 114 Ariz. 16, 30 (1976); *State v. Nunez,* 23 Ariz.App. 462, 463 (App. 1975).

Finally, the State's objection to (4) re-interviews of the medical examiners is apparently rooted in its novel belief that they are an arm of the prosecution. But examiners' duty to provide information to the State, Response at 11, does not establish an agency relationship. Arizona medical examiners are "agencies separate from law enforcement and the criminal justice system to preserve their objectivity." Http://www.maricopa.gov/MedEx/faq.aspx. The examiners themselves, "perplex[ed]" by the State's obstruction of the defense interview, emphasize their role as "totally separate from police agency as well as prosecutorial agencies." Fischione Tr. 35:2–7. The State must cease its attempts to silence them.

4. The State's bad-faith obstruction of discovery warrants sanctions.

Rule 15.7 provides that if a party fails to make a disclosure required by Rule 15, the court, upon proper motion, "*shall* order disclosure and *shall* impose any sanction it finds appropriate." Ariz R. Crim. Proc. 15.7(a) (emphasis added). "[T]hese sanctions are not merely a paper tiger," but rather are a critical safeguard against discovery rule violations. *State v. Tucker*, 157 Ariz. 433, 441 (1988). Here, the State has not merely "failed" to make a disclosure, but has vigorously and disingenuously refused to comply with its disclosure obligations after numerous requests from the defense. The State's conduct is obstructing the very "search for truth" that Arizona rules are designed to promote, *Roque*, 213 Ariz. at 20. This bad-faith conduct should not be tolerated.

III. CONCLUSION

For the foregoing reasons, Mr. Ray requests the Court grant the motion to compel disclosure and order the requested sanctions.

DATED: July 28, 2010

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